OWI Update

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I. Canine Sniffs

State v. Pedro Ibarra Murillo Jr., No. 17-1025 (Iowa Court of Appeals, filed July 5, 2018)

Deputy had reasonable suspicion the defendant was hiding drugs and did not violate his constitutional rights having a K-9 unit come to the scene. The defendant's statement "that he was unable to open the locked center console-when a rational inference led Deputy Jacobs to conclude the ignition key would unlock the compartment-considered in conjunction with his association with [the passenger], a known drug dealer who was found to have drugs on his person at that time, and [the defendant's] initial refusal to open or unlock the doors, provided a basis for reasonable suspicion there were drugs in [the defendant's] vehicle." The deputy's decision to detain the defendant to have a K-9 unit come to the scene did not violate the defendant's constitutional rights. The Court noted that refusing to consent to a search cannot be used to establish reasonable suspicion to conduct a warrantless search.

Rodriguez v. U.S., 575 U.S. __, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015)

A traffic stop may last for as long as it takes the officer to "handle the matter for which the stop was made"; any additional detention is subject to a Fourth Amendment analysis for that detention; an officer may not extend the duration of the stop for additional investigation (or "expand the scope" of the stop) unless the officer has grounds to justify the additional detention (here, an officer with a drug dog on the scene conducted a dog sniff on the car seven or eight minutes after completing the traffic stop; this additional detention-in the absence of sufficient articulated grounds for the detention-violated the Fourth Amendment; case remanded to determine if the officer did or did not have grounds to justify the additional detention.)

II. Automobile Searches

a. Search Incident to Arrest

State v. Gaskins, 866 N.W.2d 1 (Iowa 2015)

Under article I, section 8 of the Iowa Constitution, if an officer has arrested the driver in a traffic stop, the officer may not search the vehicle incident to that arrest unless there is a likelihood that the arrestee "could access the vehicle to obtain a weapon or destroy evidence"; this interpretation is more protective of citizens' rights than the standard under the U.S. Constitution, which, according to Arizona v. Gant, 556 U.S. 332 (4/21/09) would permit a search incident to arrest in such cases if "it is reasonable to believe the vehicle contains evidence of the offense of arrest." Note: the Court clearly expresses a preference for search warrants in automobile searches.

b. The Automobile Exception

State v. Storm, 898 N.W.2d 140 (Iowa 2017)

Probable cause plus exigent circumstances exception to the warrant requirement valid for search of automobile due to odor of marijuana, known as automobile exception, as no procedure for electronic search warrants or process other than personal appearance before a judicial officer exists to obtain search warrants, danger of prolonged roadside detentions not mitigated by net gain in individual privacy.

State v. Jennifer Brandt, No. 18-2159 (Iowa Court of Appeals, filed March 18, 2020)

The search of the passenger's purse left in the vehicle was lawful under the automobile exception. When a deputy approached the driver to give him a citation, he observed an odor of alcohol coming from the driver. The driver admitted to drinking and

that there were open containers in the back of the vehicle. The deputy searched the vehicle, including the defendant's purse she had left on the passenger side floorboard. Held, the search of the purse was lawful under the automobile exception; there was probable cause (odor of alcohol, admission to drinking; admission to open containers in the vehicle) and the vehicle provided the exigent circumstances. "When there is probable cause to search a vehicle, law enforcement may also search any belongings of a passenger in the vehicle that can conceal the object of the search."

State v. Jhamond McMullen, 940 N.W.2d 456 (Iowa App. 2019)

The officer was qualified to detect the smell of marijuana and his observation of marijuana coming from the vehicle "established probable cause for the search." After stopping a vehicle for not having its headlights on after dark, the officer smelled an odor of marijuana coming from the driver's side window. The officer testified about his qualifications regarding the smell of marijuana. Held, the officer was qualified to detect the smell of marijuana and his observation of marijuana coming from the vehicle "established probable cause for the search."

i. Pilot Project

The Supreme Court of Iowa's Supervisory Order – *In the Matter of Establishment of the Electronic Search Warrant Pilot Project*:
https://www.iowacourts.gov/collections/490/files/1081/embedDocument/

The Supreme Court of Iowa's Memorandum of Operation – *In the Matter of the Electronic Search Warrant Pilot Project*:
https://www.iowacourts.gov/collections/490/files/1084/embedDocument/

III. OWIs

a. Operation

Ehrp v. Iowa Dep't of Transp., Motor Vehicle Dep't, 2011 WL 662663 (Iowa Ct. App. 2011)

"Operation" examined; person steering pickup truck being pulled backwards is "operating." The defendant was "operating" his vehicle when he was in the driver's seat and steering while the vehicle was being pulled out of a ditch. The defendant was "operating" his vehicle when he was in the driver's seat and steering while the vehicle was being pulled out of a ditch even though the vehicle's engine was off. (The majority and dissenting opinion contain discussion of most published "operation" cases ever decided by the Iowa courts.)

State v. Murray, 539 N.W.2d 368 (Iowa 1995)

Whether the vehicle is capable of being moved is not "an essential element of "operating." The defendant was in the vehicle, the vehicle was running, but due to a nonworking clutch the vehicle was incapable of being moved. Held, Whether the vehicle is capable of being moved is not "an essential element of "operating." "Thus the disablement of Murray's vehicle does not place his conduct beyond the scope of the statute." It should be noted that the defendant also did not become intoxicated until after the vehicle became disabled.

State v. David Alan Francis, No. 18-0831 (Iowa Court of Appeals, filed June 5, 2019)

Defendant does not have to "drive" a motor vehicle to "operate" it. A law enforcement officer observed the defendant stumble while walking through a parking lot outside of a bar and grill, get inside his vehicle, and turn it on. The officer approached the defendant and observed an odor of alcoholic beverage, slurred speech, and bloodshot and watery eyes.

After the defendant did not pass the SFSTs, he submitted a chemical breath test with a BAC of .139. At trial, the defendant testified he did not turn the vehicle on and a witness testified that the engine was not on when the officer approached the vehicle. The defendant was subsequently convicted of OWI 3rd. Held, there was sufficient evidence to prove the defendant was "operating" the motor vehicle. A defendant does not have to drive a motor vehicle to operate it. State v. Weaver, 405 N.W.2d 852, 854 (Iowa 1987).

Munson v. Iowa Dep't of Transp., Motor Vehicle Div., 513 N.W.2d 722 (Iowa 1994)

"Operation" requires the vehicle's engine to be running or the defendant exercising physical control of the vehicle while it is in motion. *See Iowa Criminal Jury Instruction 2500.6* (2018). The defendant was not "operating" the motor vehicle. An intoxicated defendant was found asleep in his parked vehicle with the key in the ignition and the radio on.

b. Witness Testimony

State v. Jeffrey Michael Moeller, No. 17-1764 (Iowa Court of Appeals, filed February 6, 2019)

Proper foundation will allow a witness to give an opinion about the defendant's intoxication. During the defendant's OWI 3rd trial, a witness (worked as a firefighter and detention officer) testified that the defendant's breath smelled of alcohol and he had bloodshot and watery eyes. The witness testified he has frequent interactions and had some training with intoxicated people. The witness then gave an opinion as to whether the defendant "was under the influence of alcohol[.]" Held, due to the witness's training and personal observations of the defendant, there was no error in allowing the witness to express his opinion about the defendant's sobriety.

c. SFSTs

i. Miranda

State v. Jose Manuel Cruz Ordonez, No. 18-0407 (Iowa Court of Appeals, filed April 17, 2019)

The HGN test does not violate the defendant's "right against self-incrimination." During an OWI investigation, the defendant showed signs of impairment when he performed the HGN test. Held, under prior precedent, the HGN test does not violate the defendant's "right against self-incrimination." *See* State v. Marks, 644 N.W.2d 35, 37 (Iowa Ct. App. 2002); State v. Mannion, 414 N.W.2d 119 (Iowa 1987); and State v. Rauhauser, 272 N.W.2d 432 (Iowa 1978). The HGN "elicited a physical, non-testimonial response rather than a communicative, testimonial response." The Court further stated: "Nor does the claimed absence of an opportunity to 'deny the test' implicate the Fifth Amendment right against self-incrimination."

State v. Jose Manuel Cruz Ordonez, No. 18-0407 (Iowa Court of Appeals, filed April 17, 2019)

The officer's request for the defendant to perform the HGN was not a search under the Fourth Amendment. During an OWI investigation, the officer had the defendant perform the HGN test, which indicated signs of impairment. The defendant filed a motion to suppress the HGN test results as an unlawful warrantless search, which the district court denied. Held, the officer's request for the defendant to perform the HGN (i.e., SFSTs) was not a search under the Fourth Amendment. *Citing* State v. Marks, 644 N.W.2d, 35, 38 (Iowa Ct. App. 2002): "'When an officer has reasonable cause to believe the driver is operating while intoxicated, a suspect may be briefly detained, asked to perform field sobriety tests and comply with other investigatory requests, without violating the suspect's Fourth Amendment rights."

State v. Marks, 644 N.W.2d 35 (Iowa App. 2002)

Fifth Amendment does not apply to field sobriety tests because such tests do not result in testimonial evidence; a threat to arrest for refusal to perform field sobriety tests is not a coercive, prohibited tactic forbidden by the Fifth Amendment.

Pennsylvania v. Muniz, 496 U.S. 582 (1990)

Questions designed to show a defendant's confusion (as opposed to routine questions that result in confused or impaired responses) are inadmissible if not preceded by Miranda.

d. Reasonable Grounds for PBT

State v. Wilkes, 756 N.W.2d 838 (Iowa 2008)

"Irregularity" with walk and turn and one-legged-stand not significant where officer administered HGN, detected strong smell of alcohol and the defendant conceded he had been drinking; the foregoing was reasonable articulable suspicion to administer the preliminary breath test . . . (and those results) . . . .constituted probable cause to invoke implied consent.

e. PBT

State v. Mannion, 414 N.W.2d 119 (Iowa 1997)

SFST's do not require Miranda warnings, all nontestimonial evidence collected in OWI investigations do not implicate Miranda, including chemical tests.

State v. Dennis Todd Steinlage, No 14-0664 (Iowa Court of Appeals, filed June 10, 2015)

Suspects have no right under Iowa Code section 804.20 to consult with an attorney before taking or refusing a PBT; this defendant received and exercised 804.20 rights after the arrest and before deciding whether to consent to a test; OWI conviction affirmed.

State v. William J. Burns, No. 13-1688 (Iowa Court of Appeals, filed October 29, 2014)

Where a defendant refuses all testing, there is no requirement that the officer say the words "PBT" or "preliminary breath test" before invoking implied consent; a defendant's repeated refusal to consent to any test, combined with reasonable grounds, substantially complies with Iowa Code section 321J.6 and is sufficient to invoke implied consent.

State v. Brett Edward Jones, No. 17-0006 (Iowa Court of Appeals, filed January 10, 2018)

Refusal of PBT communicated by actions and silence, implied consent properly invoked. After failing SFSTs, defendant was offered a PBT. Defendant was silent for 18 seconds, and then started to put chewing tobacco in his mouth as the officer told him to stop. Defendant continued to put chew in his mouth as officer explained that it, "messes with the test" and advised that he would consider his actions to be a refusal. The officer then placed handcuffs on defendant, transported him to the station, and invoked implied consent based upon the defendant's refusal of the PBT. Trial court ruled that implied consent was invoked based upon arrest, even though officer did not indicate that on the form. Held that officer did request PBT from the defendant, and PBT was refused based upon objective consideration of conduct of defendant and surrounding circumstances, and a broad definition of "refusal" is appropriate.

Hager v. Iowa DOT, 687 N.W.2d 106 (Iowa App. 2004)

OWI Suspect does not have a right to view PBT results.

State v. Albrecht, 657 N.W.2d 474 (Iowa 2003)

Only one PBT test is required under Iowa's implied consent statute; Iowa's PBT results are for screening only, so manufacturer's instructions regarding the use of two PBTs for evidentiary tests do not apply to Iowa implied consent testing

State v. Ness, 907 N.W.2d 484 (Iowa 2018)

Admission of PBT results at trial results in reversal of conviction. Defendant drove himself to the office of his probation officer, who administered a PBT after detecting the odor of alcohol on his breath. Defendant was subsequently charged with OWI 3rd, and the results of the PBT were admitted at trial over defendant's objection. On appeal, the State argued that error was either not preserved or was harmless. Held that error was preserved because the State filed a motion in limine for a pretrial determination of admissibility before trial and the defendant resisted the motion. The Iowa Supreme Court also found the error was not harmless because while the other evidence of intoxication was strong, it was not so strong as to overcome the presumption of prejudice and emphasis placed on the importance of the PBT result by the prosecutor to the jury.

State v. Bird, 663 N.W.2d 860 (Iowa 2003)

State must show "substantial compliance" with administrative rules for maintaining PBT logs; failure to include on log the "value and type of standard" used in calibration does not require suppression.

State v. Thompson, 815 N.W.2d 55 (Iowa Court of Appeals., filed April 11, 2012)

Where defendant failed sobriety testing and the PBT, and where the calibration log for the PBT was up to date in all respects except that it did not contain information on the "value and type of standard used" for calibration, reliance on the failed PBT to invoke implied consent was proper; suppression ruling reversed, and case remanded for further proceedings.

Ethan Wendall Boyer v. Iowa DOT, No. 1-391 / 00-1964 (Iowa Court of Appeals, filed November 16, 2001)

PBT calibration. Failure to calibrate PBT within thirty days of use not fatal to determination of "reasonable grounds to believe" driver was OWI, where officer relied upon other factors (smell of alcohol, speed of vehicle, admissions of driver) as part of the basis for "reasonable grounds"; driver did not meet burden to show that Intoxilyzer was operated improperly or that the results were not reliable.

f. Deprivation (Observation) Period

Ryan Paul Hollinrake v. Iowa DOT, Motor Vehicle Division, No. 2-499 / 01-1847 (Iowa Court of Appeals, filed August 14, 2002)

15 minute observation period. Driver cannot defeat an implied consent revocation merely by pointing out that he or she was not under continuous observation for 15 minutes before a test was administered; the driver must present evidence to show that something occurred to make the test unreliable, and may not defeat a revocation on mere speculation that something might have happened during the observation period to invalidate the test.

State v. Hershey, 348 N.W.2d 1 (Iowa 1984)

The State needs to be able to show there is no "reasonable probability" the defendant introduced anything into their mouth (e.g., tobacco, liquid, etc.). "Just as it is not always necessary to show continuous custody for admissibility of physical evidence, it is not always necessary to show a 15-minute period of continuous observation to satisfy the requirement at issue in this case." "Although the officers did not watch defendant continuously during the ride to the police station, he was seated during that period in the back seat of the police car with his hands handcuffed behind his back. Moreover, the record shows he did not have access to tobacco products, food or beverages at any time subsequent to being stopped."

State v. Calvin Eugene Owen, No. 6-080 / 05-0685 (Iowa Court of Appeals, filed March 1, 2006)

No need to prove refrigeration of blood sample. Foundation for introduction of blood test results is at Iowa Code section 321J.11; "attempts to impose additional factors. . .such as proof the blood was kept under refrigeration and details of the methods and procedures used in transporting the blood" rejected as "extra-321J" requirements.

g. Implied Consent

State v. Timothy Douglas Seils, No. 18-0481 (Iowa Court of Appeals, filed May 15, 2019)

"[T]he foundation requirements for implied consent had not been met" when implied consent was invoked. After receiving a report of a possible intoxicated driver, an Iowa State Trooper initiated a traffic stop on the defendant's vehicle after observing the defendant make a wide turn (veering into oncoming traffic). The trooper observed the defendant had an odor of alcoholic beverage, watery and bloodshot eyes, and his balance was a little off. After the defendant refused the SFSTs, he attempted to run into his home before he was stopped by a trooper, handcuffed, and arrested for interference. The defendant was transported to jail where he refused to provide a chemical breath test after implied consent was invoked. During a suppression hearing, the trooper admitted that the defendant was only arrested for OWI after implied consent was invoked. The defendant argued none of the factors listed in 321J.6(1)(a) existed when implied consent was invoked. Held, "the foundation requirements for implied consent had not been met" when implied consent was invoked; evidence of the defendant's refusal of the chemical test should have been suppressed. The case was remanded for a new trial.

State v. Dion Caldwell, No. 19-0894 (Iowa Court of Appeals, filed January 21, 2021)

To properly invoke implied consent under 321J.6(1)(a), an officer must tell a person they are under arrest for OWI before invoking implied consent. In attempting to complete a traffic stop, an officer informed the defendant he was under arrest for interference with official acts. The officer then transported the defendant to the jail to conduct an OWI investigation. At the jail, the defendant's handcuffs were removed and he then refused three SFSTs. The officer then placed the defendant back in handcuffs and took him to the Datamaster room, where implied consent was invoked. The officer did not tell the defendant he was under arrest for OWI before implied consent was invoked. Held, to properly invoke implied consent under 321J.6(1)(a), an officer must tell a person they are under arrest for OWI before invoking implied consent. 321J.6(1)(a); 804.14.

State v. Frederic Hayer, No. 17-1951 (Iowa Court of Appeals, filed March 6, 2019)

There were reasonable grounds to invoke implied consent. After a deputy stopped the defendant for expired registration, he observed an odor of marijuana (including on the defendant's breath), and the defendant admitted to using marijuana just prior to being stopped and being "a little bit" affected by it. The defendant then passed the SFSTs and the PBT. The deputy then invoked implied consent based on the defendant's admissions and the odor marijuana and obtained a urine sample, which tested positive for marijuana metabolites. The defendant filed a motion to suppress arguing the deputy did not have "reasonable grounds" to invoke implied consent, which was denied. After a jury trial, the defendant was convicted of OWI 1st, carrying weapons, and possession of marijuana. Held, there were reasonable grounds to invoke implied consent.

State v. David Patrick Brewer, No. 16-1117 (Iowa Court of Appeals, filed April 18, 2018)

Sufficient evidence to uphold the conviction for OWI. Defendant was operating a motor vehicle when he struck a concrete barrier, drove across multiple lanes of traffic, jumped across an on-ramp, drove through a ditch and struck another vehicle causing serious injuries to the other driver. After the defendant was taken to the hospital, an Iowa State Trooper observed defendant had dilated pupils, an elevated heart rate, bloodshot and watery eyes, admitted to using marijuana approximately four days before, admitted to drinking alcohol the night before, and was able to answer questions, except about the accident. Defendant's urine sample was positive for marijuana metabolites. Held, there was sufficient evidence to convict defendant under Iowa Code section 321J.2(1)(a) (under the influence of a controlled substance) or 321J.2(1)(c) ("while any amount of controlled substance is present").

State v. Lyon, 862 N.W.2d 391 (Iowa 2015)

Officer who provided the suspect with Miranda warnings, then read the implied consent advisory, and then offered the suspect phone calls complied with the requirements of 804.20; an officer need not request a sample before offering 804.20 calls and need only advise who may be called (family member or an attorney); there is no requirement that the officer advise the suspect to use the call to decide whether to consent to the test.

State v. Arthur Cherry, No. 14-1248 (Iowa Court of Appeals, filed August 5, 2015)

OWI defendant told the officer that he had only half of a Smirnoff malt beverage, and then asked the officer if he would be able to pass the test; the officer told the defendant that "if he was truthful and that's all that he had to drink and it's been over an hour, that he should be able to pass the test" and further explained that "on average an adult male can process one drink per hour"; the officer's statements were not deceptive and were truthful; defendant's consent was voluntary.

State v. Garcia, 756 N.W.2d 216 (Iowa 2008)

When processing a non-English speaking OWI suspect, officers have a duty to "make reasonable efforts to convey the consequences" of the implied consent decision; officer's efforts to be judged objectively and not from the driver's point of view (officer's attempts to communicate with Spanish speaking defendant deemed "reasonable efforts").

State v. Jose Manuel Lopez-Pena, No. 3-761 / 12-2130 (Iowa Court of Appeals, filed September 5, 2013)

"Reasonable efforts" to convey warnings to Spanish-speaking driver; OWI 2nd conviction affirmed. Officer made reasonable efforts to convey implied consent and Miranda warnings to a Spanish speaking driver/defendant where driver complied with requests for license, registration, and insurance, generally followed instructions for SFSTs and responded to the officer's questions, the driver's passenger translated "the consequences of failing or refusing the test" (although not the advisory itself) and where the defendant continued to communicate with the officer in English until informed he was under arrest; officer's actions constituted "reasonable efforts" to convey the information; *see* State v. Garcia, 756 N.W.2d 216 (Iowa 2008).

State v. Stroud, 314 N.W.2d 437, 438-439 (Iowa 1982)

Miranda warnings are not required “before the invocation of the implied consent procedures.”

Swenumson v. Iowa Dep't of Pub. Safety, 210 N.W.2d 660, 663 (Iowa 1973)

Since the Miranda warning applies to interrogation and the implied consent procedure relates to submission of a bodily substance to chemical testing, the warning does not purport to make the Miranda rights applicable during the implied consent proceeding.

State v. Melanie Anne Holman, No. 18-0958 (Iowa Court of Appeals, filed March 4, 2020)

"Miranda rights do not apply to a request to submit to chemical testing under implied consent procedures." After stopping the defendant for a brake light being out and noticing signs of impairment, the officer conducted an OWI investigation. As a result of the investigation, the defendant was arrested and transported to the jail for chemical testing. On the way to the jail, the defendant requested to have her attorney present. At the jail, the officer read the defendant implied consent and gave her an opportunity to make phone calls prior to making a decision about whether or not to provide a breath sample. After talking to her daughter, the defendant consented and had a BAC of .107. The defendant appealed her conviction, arguing her counsel was ineffective for failing to suppress the breath results because her Miranda rights were violated after she requested to have an attorney present during her ride to the jail. Held, counsel was not ineffective for failing argue the breath sample was obtained in violation of the defendant's Miranda rights; "Miranda rights do not apply to a request to submit to chemical testing under implied consent procedures."

h. Chemical Test Choice

State v. McIver, 858 N.W.2d 699 (Iowa 2015)

Officer, not suspect, determines which type of specimen to test for OWI (here, officer requested breath and suspect refused and demanded a blood test).

i. Refusal, Then Want to Test

State v. Conner Daniel Carney, No. 16-1618 (Iowa Court of Appeals, filed July 19, 2017)

Officer not required to allow a motorist to change their mind after a test refusal, but a second request is permissible. Defendant was involved in personal injury collision and implied consent was invoked at the hospital. The defendant initially refused a breath test, but when implied consent was explained again, he consented to a blood test. Held that 321J does not prevent an officer from requesting another sample after an initial refusal.

j. 804.20

State v. Garrity, 765 N.W.2d 592 (Iowa 2009)

After an arrest, any request for any type of phone call triggers 804.20 rights and officer has duty to advise defendant of who may be called under the statue.

State v. Moorehead, 699 N.W.2d 667 (Iowa 2005)

Consultation rights violated where parents came to the scene to recover the car, and mother hollered at defendant, but no arrangements for consultation either at scene or at the station; in addition, consultation rights under 804.20 are treated like Miranda rights: A violation requires exclusion of not just the test results, but also any incriminating statements that would be suppressed under Miranda.

State v. Lyon, 862 N.W.2d 391 (Iowa 2015)

Officer who provided the suspect with Miranda warnings, then read the implied consent advisory, and then offered the suspect phone calls complied with the requirements of 804.20; an officer need not request a sample before offering 804.20 calls and need only advise who may be called (family member or an attorney); there is no requirement that the officer advise the suspect to use the call to decide whether to consent to the test.

State v. Dennis Todd Steinlage, No 14-0664 (Iowa Court of Appeals, filed June 10, 2015)

Suspects have no right under Iowa Code section 804.20 to consult with an attorney before taking or refusing a PBT; this defendant received and exercised 804.20 rights after the arrest and before deciding whether to consent to a test; OWI conviction affirmed.

State v. Davis, 922 N.W.2d 326 (Iowa 2019)

The defendant's 804.20 rights were not triggered until he was "arrested and brought from the sally port to the jail's intake room[,]" even though he was transported from the crash scene to the jail's sally port in order to complete the SFSTs due to inclement weather. A deputy responded to a motor vehicle crash and due to the weather conditions only had the defendant perform the horizontal-gaze-nystagmus test. The deputy informed the defendant he needed to transport him to the jail to perform the remaining SFSTs in a controlled environment because of the weather conditions. Prior to leaving the area, the defendant advised his wife to contact his attorney. Once inside the deputy's vehicle, the deputy read defendant his Miranda rights, but the deputy did not put him in handcuffs. The defendant asked to consult with his wife, but was denied at that time. The deputy obtained defendant's cellphone from his wife and informed defendant that he would give it to him once they were at the jail. The defendant did not ask during the trip to the jail to call his wife or attorney from his cellphone. Once the arrived at the jail, the deputy had the defendant perform two more SFSTs in the sally port. The deputy then placed the defendant under arrest for OWI, walked him to the intake room, and allowed him to make a phone call. The defendant filed a motion to suppress arguing his 804.20 rights were violated prior to the SFSTs being administered. Held, the defendant's 804.20 rights were not violated, the sally port was not a place of detention, it was a place used for testing (SFSTs). A defendant's 804.20 rights are triggered after two conditions: (1) arrest or restraint of liberty (i.e., in custody) and (2) "arriving at the place of detention." The Court found that "the sally port was not a 'place of detention' under 804.20 (the defendant's "freedom was not any more restricted there than it would have been at the scene of the accident"). The Court noted that you should read State v. Moorehead, 699 N.W.2d 667 (Iowa 2005) with care.

State v. Rudy Danilo Depaz Colocho, No. 18-1643 (Iowa Court of Appeals, filed November 6, 2019)

"[T]he officer's delayed advisory of [the defendant's] rights satisfied the purpose of section 804.20" and the test refusal was properly admitted. After stopping the defendant's vehicle to conduct an OWI investigation, the defendant indicated he needed to use the bathroom before he would consider performing any standard field sobriety tests (SFSTs). The officer handcuffed the defendant, transported him to the police station, and allowed him to use the bathroom. When the defendant finished, the officer requested the defendant perform the SFSTs in the police station, but the defendant asked to call an attorney. The officer refused the defendant's request to call an attorney. The defendant then refused to perform the SFSTs and the PBT. The officer then arrested the defendant. The officer read the defendant his 804.20 rights, provided him with his cellphone and phone book, but he did not make any phone calls. The officer then invoked implied consent and the defendant refused to provide a breath sample. The defendant filed a motion to suppress arguing that his 804.20 rights were violated from the point he initially requested to contact an attorney. The District Court found the defendant's 804.20 rights were violated when he initially requested to contact and attorney, but the State cured the violation when the officer later advised the defendant of his 804.20 rights and gave the opportunity to make phone calls. The District Court suppressed everything from the initial request until the defendant was advised of his 804.20 rights and the defendant appealed. Held, "the officer's delayed advisory of [the defendant's] rights satisfied the purpose of section 804.20" and the test refusal was properly admitted Furthermore, the Court found that "any violation was harmless error" due to the defendant's poor driving and the officer's observations. It should be noted that the Court of Appeals did not make a finding on whether "the district court properly found an initial violation of section 804.20.

State v. Dion Caldwell, No. 19-0894 (Iowa Court of Appeals, filed January 21, 2021)

Although the defendant was at the place of detention and properly invoked his right to an 804.20 phone call after the first SFST, the officer did not violate his 804.20 rights by requesting the remaining two SFSTs before giving him the opportunity to make phone calls because this resulted in only an approximately six minute delay. An officer observed the defendant's vehicle traveling down the road with its horn honking lights flashing. When the officer attempted to stop the vehicle to determine if everything was alright, the defendant's vehicle speed off. After the defendant stopped his vehicle, he exited and attempted to walk away. The officer asked the defendant to stop walking, but he refused. The officer then attempted to place the defendant in handcuffs, but he resisted. The officer arrested the defendant for interference with official acts. The officer observed an odor of alcohol coming from the defendant. Due to the defendant's behavior, the officer transported him to the jail to administer the SFSTs. The officer took the defendant into a hallway "within the jail facility", where the defendant refused the HGN test. When the officer asked the defendant to perform the walk and turn test, the defendant requested to call his mother. The officer denied the request at this time. The defendant then refused the walk and turn test and the one-leg stand test. The officer then invoked implied consent and gave the defendant an opportunity to make phone calls approximately six minutes after his request. After making phone calls, the defendant refused to provide a breath sample for the Datamaster. The defendant filed a motion to suppress his refusal of the last two SFSTs and the Datamaster as a violation of his 804.20 rights. Held, , although the defendant was at the place of detention and properly invoked his right to an 804.20 phone call after the first SFST, the officer did not violate his 804.20 rights by requesting the remaining two SFSTs before giving him the opportunity to make phone calls because it resulted in only an approximately six minute delay. The Court of Appeals found the delay was extremely short, not due to officer misconduct or laziness, and the defendant had the opportunity to make calls before deciding whether to take the chemical test.

State v. Hellstern, 856 N.W.2d 355 (Iowa 2014)

Pursuant to Iowa Code section 804.20, if a suspect indicates a desire for a confidential meeting with an attorney, the police officer must advise the suspect that the attorney may come to the station for a private consultation.

State v. Senn, 882 N.W.2d 1 (Iowa 2016)

Plurality opinion finds that no Iowa or federal constitutional right to consult with counsel attaches until formal criminal charges are filed; attorney consultation rights under Iowa Code section 804.20 arise from the terms of the statute and do not include a right to a private attorney telephone consultation (concurring opinion states that even assuming that such a constitutional right exists, the defendant did not show a violation of such a right or that the rights he exercised under section 804.20 were inadequate; three dissenting justices would have found that under the Iowa constitution, a right to counsel attached when the defendant was arrested).

k. 321J.11 Independent Testing

State v. Bloomer, 618 N.W.2d 550 (Iowa 2000)

OWI suspect has right to independent test only after completing test requested by the officer.

State v. Bryan A. Daniel, No. 16-0891 (Iowa Court of Appeals, filed February 22, 2017)

Defendant who refuses breath test has no right to independent test. Defendant requested blood test while refusing to consent to breath test offered by officer after arrest for OWI. *Citing* State v. Wootten, 577 N.W.2d 654 (Iowa 1998), held that despite defendant's statements that he wanted a blood test, his right to an independent test was not invoked due to refusal of breath test, and officer was not required to advise the defendant of his right to an independent test unless he not only makes a statement reasonably construed as a request for an independent test, but also consents to the officer's request for a test.

State v. Lukins, 846 N.W.2d 902 (Iowa 2014)

If a defendant requests a "re-test" or mentions testing after completing the officer administered test, the officer must advise the defendant of the right to an independent test under Iowa Code section 321J.11; failure to do so results in suppression of the officer-administered test.

State v. Smith, 926 N.W.2d 760 (Iowa 2019)

The defendant's right for independent testing was not violated because "only statements regarding additional testing are sufficient to invoke the statutory right." After stopping the defendant, an officer requested the defendant perform the Standard Field Sobriety Tests (SFSTs) and provide a sample for the PBT. During this process, the defendant stated on multiple occasions that if he refused to perform any of the requested tests, the officer would just obtain a blood sample from him for testing. After the defendant performed the SFSTs and provided a sample for the PBT that was over .08, the defendant was arrested and transported to the jail. At the jail, the defendant provided a chemical test with a result of .188. The defendant did not inquire about independent testing, retesting, or any questions about other testing. The defendant was then charged with OWI 1st. The defendant appealed the denial of his motion to suppress, arguing that his right to independent testing under Iowa Code section 321J.11 was violated. Held, the defendant's "[s]tatements regarding chemical testing in lieu of the officer's testing are insufficient to invoke section 321J.11." The Court stated: "More important than the form of [the defendant's] statements is the substance of his statements. . . . Because the statute only provides the right to independent testing in addition to testing administered by the officer, only statements regarding additional testing are sufficient to invoke the statutory right."

State v. Thomas Christophor Casper, 951 N.W.2d 435 (Iowa 11/20/2020)

Defendant's right to independent testing was not violated when the trooper offered the defendant the second test the defendant requested and then the defendant declined, even though the trooper did not advise the defendant of the defendant's right to an independent test after the request. After a traffic stop and OWI investigation, the defendant was arrested for OWI and other violations. At the jail, the trooper invoked implied consent, the defendant declined the offer to make phone calls, and he provided a breath sample that resulted in a .113 BAC. The defendant was then interviewed and booked into jail. Later, the defendant was bonded out and as he was exiting the jail, he asked the trooper if he could test again on the Datamaster. The trooper responded "Sure" but requested his license again to enter the information into the Datamaster. The defendant then decided not to take another test and left the jail. The trooper never advised the defendant regarding independent testing. The defendant filed a motion to suppress arguing the trooper denied his right to independent testing when the trooper failed to advise him about independent testing after he requested a second test. Held, under these facts, the defendant's rights to independent testing (321J.11(2)) were not violated. Iowa Code section 321J.11 provides the detainee an opportunity for an independent test, "but generally does not require the officer to inform the detainee of that right." "A defendant who asks for something law enforcement refuses should be informed of similar alternatives that would be available." However, if law enforcement grants the defendant's request, they do not need to advise the defendant of other alternatives; "the guiding principle is one of

fairness, not disclosure." "Therefore, in our view, the officer must inform the detainee of the right to an independent test only in circumstances when the detainee has reasonably asked about that right or a failure to disclose that right could be misleading."

State v. Dale Leroy Cheney Jr., No. 18-2100 (Iowa Court of Appeals, filed August 21, 2019)

The trooper's actions of issuing a citation for OWI and releasing the defendant did not "hinder" the defendant's ability to obtain an independent test under 321J.11. After a traffic stop and an OWI investigation, the defendant provided a chemical breath test of .137. The defendant invoked his right for an independent breath test pursuant to 321J.11 and the trooper informed him that he would receive a citation for the OWI charge and then the trooper would transport him to his residence and he would be released so someone could take him for his independent test. Held, the trooper actions of issuing a citation for OWI and releasing the defendant did not "hinder" the defendant's ability to obtain an independent test under 321J.11. "Rather, [the trooper] took steps to facilitate [the defendant's] desire to undergo an independent test—he released him from detainment and took him home, where he could arrange for his chemical testing." The Court found the defendant "was afforded a reasonable opportunity to pursue an independent test but failed to do so." The Court further found that when the trooper seized the defendant's driver's license, this did not hinder his ability to get an independent test (the Court noted the trooper seized his license and issued a temporary license as required by statute).

I. The Two '2 Hour' Rules

State v. Martin, 383 N.W.2d 556 (Iowa 1986)

The two hour limit under 321J.6 does not apply where the officer's written request for the test was based solely on the defendant's involvement in a motor vehicle or collision resulting in personal injury or death, based upon a concern for the welfare of victims of accidents involving personal injury or death.

State v. Bradley Ronald Cooper, No. 2-426 / 11-0960 (Iowa Court of Appeals, filed June 27, 2012)

The two hour periods of 321J.2(12)(a) (presumption for test within two hours of operation) and 321J.6(2) (period after arrest or PBT for officer to request a specimen) "apply to the State in the interest of a prosecution of an intoxicated driver. The provisions do not . . . set forth a certain time frame for a defendant to delay, wait, or stall until he or she submits to a breath test."

State v. Colton Eugene Dunphy, No. 17-1693 (Iowa Court of Appeals, filed October 24, 2018)

The officer did not violate the defendant's 804.20 rights. After being arrested for OWI, the officer read the defendant his 804.20 rights and gave him over 40 minutes to make phone calls. During the 40 minutes, the officer re-read the defendant his rights more than once, provided a phone book, and allowed him to meet with his mother in the law enforcement center. After the officer told the defendant he had to decide if he was going to submit to chemical testing, he spoke to an attorney by phone. During the defendant's phone call with the attorney, the officer denied a request for an attorney to come to the jail to speak with the defendant. The officer informed the attorney that he was invoking implied consent as soon as the phone call was finished. The officer then allowed the defendant to finish his phone call with the attorney. Held, the officer did not violate the defendant's 804.20 rights; the officer gave the defendant a reasonable amount of time to consult with an attorney.

State v. Kelly, 430 N.W.2d 427 (Iowa 1988)

The two-hour requirement under 321J.6 is not a foundational requirement for the admissibility of evidence in an OWI prosecution.

State v. Kjos, 524 N.W.2d 195 (Iowa 1994)

"Under Kelly, the results of a chemical test are not inadmissible simply because the test is offered more than two hours after the defendant's arrest. However, if the test is offered more than two hours after the defendant' arrest *and* the defendant's consent is obtained by the false threat of license revocation, then the test results must be excluded."

IV. Impaired Driving

State v. Childs, 898 N.W.2d 177 (Iowa 2017)

Any amount of a prohibited drug in one's body, including a nonimpairing metabolite, violates OWI statute, regardless of whether the ability to drive is impaired.

State v. Newton, 929 N.W.2d 250 (Iowa 2019)

OWI based on "any amount of a controlled substance" is not unconstitutionally vague and does not lead to arbitrary enforcement. Defendant was convicted of OWI 2nd and child endangerment based upon the "any amount" alternative in 321J.2(1)(c). The defendant raised a due process violation for vagueness. Defendant argued that a person is not on notice when they are in violation of the law because metabolites of drugs can appear in urine long after impairment is no longer present. Held, "the clause of the OWI statute that makes it unlawful for a person to operate a motor vehicle with any amount of a controlled substance in his or her person does not violate the Due Process Clause of either our Federal or State Constitution as applied to this case." As long as a person is aware of the described conduct (consuming controlled substances) that places a person in jeopardy of violating the statute, due process is satisfied, and the statute does not lead to arbitrary enforcement because a law enforcement officer needs reasonable grounds to believe that a person is impaired in order to invoke implied consent. The Court further found: "When a prosecution under the statute is driven by reasonable grounds of an ongoing impairment, as in this case, the "any amount" standard is rationally related to the compelling safety concerns of the State." The majority did note that an officer needs to have reasonable grounds of impairment at the time of invoking implied consent (i.e., not based on the fact that the suspect is known to have used drugs on a regular basis) to avoid a successful challenge to the statute.

State v. Bond, 493 N.W.2d 826, 828 (Iowa 1992)

For the purposes of Iowa Code section 321J.2, a drug is defined as "any substance that affects the body so as to impair an individual's ability to operate a motor vehicle."

State v. Owen Robert Gordon, No. 15-2038 (Iowa Court of Appeals, filed November 8, 2017)

Sufficient evidence of operation while intoxicated based upon DRE evaluation, admissions and driving behavior. After a pursuit, officers detected an odor of marijuana coming from the vehicle and the defendant. A canine sniff alerted on the vehicle and a bag in the vehicle. Officers located rolling papers but no drugs. Defendant driver admitted to smoking marijuana while driving and throwing the marijuana out the window during the pursuit. Defendant submitted to a DRE evaluation and was found to be under the influence, but refused to give a urine sample. Held that admission to smoking marijuana during the pursuit, combined with impaired judgment in decision to elude police and drive erratically and with excessive speed constituted substantial evidence that defendant's reason or mental ability was affected.

State v. Isai Sanchez-Casco, No. 17-1833 (Iowa Court of Appeals, filed November 21, 2018)

No abuse in discretion in allowing the DRE officer to testify as an expert on intoxication. The defendant was convicted of OWI 3rd. At trial, the State presented evidence regarding the DRE officer's qualifications (number OWI investigations, SFST instructor, ARIDE certification, and her state and national DRE certification) that responded to the scene and observed the defendant. The DRE officer then testified as an expert witness on intoxication and opined that the defendant "was intoxicated by both alcohol and non-alcohol substances" despite the defendant refusing all SFSTs and the 12-step DRE examination. The defendant appealed, arguing the district court erred in allowing the DRE officer to testify as an expert witness on intoxication. The defendant further argued there was insufficient foundation to support her opinion without psychophysical testing. Held, there was no abuse in discretion in allowing the DRE officer to testify as an expert on intoxication; the DRE officer was "well-qualified to opine on intoxication from alcohol and other substances." The Court further found there was sufficient foundation presented to support the DRE officer's opinion that the defendant was intoxicated (alcohol, drugs, or both). The DRE officer testified about her training, including the psychophysical testing, and her observations of the suspect's appearance and behavior.

V. Blood Draws

a. 808 Search Warrant vs. Implied Consent

State v. Frescoln, 911 N.W.2d 450 (Iowa Ct. App. 2017)

Implied consent statute not the exclusive means by which a chemical sample may be obtained. Defendant was arrested for OWI following a traffic stop and performance of SFSTs indicating impairment. Implied consent was never invoked, and a warrant for a sample of his blood was obtained showing a result over the legal limit. Held that implied consent statutes fall under the exceptions to the warrant requirement based upon consent, and do not require chemical testing. As long as a defendant is never presented with the opportunity to consent by invoking implied consent, nothing is refused and a general warrant is permitted under Iowa Code §321J.18 and State v. Oakley, 469 N.W.2d 681, 682 (Iowa 1991). The court also held that while a warrant to seize the sample, when construed in a commonsense manner, is valid to also test that sample, but the best practice is to state in the warrant that the purpose for requesting the sample is for chemical testing. Further, a person loses a privacy expectation in blood after its lawful removal from the body, and therefore testing does not violate constitutional protections.

b. Unconscious Drivers – Warrantless Blood Draws

Mitchell v. Wisconsin, 588 U.S. ___, 139 S.Ct. 2525 (2019)

When a "driver is unconscious and therefore cannot be given a breath test[,] . . . the exigent-circumstances rule almost always permits a blood test without a warrant." Law enforcement received a report that the defendant was intoxicated and driving. When law enforcement found the defendant, he was slurring his words, stumbling, and had trouble standing. Due to the defendant's intoxicated state, the officer elected not to do the SFSTs and instead had the defendant give a PBT sample, which registered .24. The defendant was arrested for OWI and by the time the officer arrived with him at the police station for the chemical breath test, he was unable to give a breath sample due to his intoxication. The officer then took the defendant to the hospital to obtain a blood sample; however, when they arrived, the defendant was unconscious. The officer then sought a warrantless blood draw as provided under the Wisconsin code. Wisconsin has a statute (§343.305(3)(b)) that is similar to Iowa Code section 321J.7 ("A person who is dead, unconscious, or otherwise in a condition rendering the person incapable of consent or refusal is deemed not to have withdrawn the consent provided by section 321J.6"). The

defendant filed a motion to suppress the blood test results as an unlawful warrantless search in violation of the 4th Amendment. Held, when a "driver is unconscious and therefore cannot be given a breath test[,] . . . the exigent-circumstances rule almost always permits a blood test without a warrant." The Court explained the "exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application." The Court further explained that "[b]oth conditions are met when a drunk-driving suspect is unconscious[.]" Therefore, "[w]hen police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment." However, the Court did state: "We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." **Despite the ruling in Mitchell, the best practice is to always try to obtain a search warrant if possible.**

State v. McGee, --- N.W.2d ---, No. 19-1219 (May 14, 2021)

Warrants are always the safest bet, but not always required in unconscious OWI blood draws, affirming that 321J.7 is not unconstitutional. Driver Brian McGee was the driver in a motor vehicle crash and was taken to the hospital in an unconscious state. Law enforcement received a written certification from the physician but before obtaining the blood draw, McGee woke up just long enough to urinate on himself. Law enforcement did not obtain another certification. The "reasonableness approach" applies and the Fourth Amendment requires a non-exclusive factor determination about whether there are pressing health, safety, or law enforcement needs that take priority over getting a warrant, such as 1) is the officer by himself, requiring him to leave to obtain a warrant; 2) is the person being transported out of state; 3) did the person lose consciousness after you began the implied consent process, thereby adding additional time to the equation because now you have to transport to the hospital; 4) it is the middle of the night and the judge is difficult to reach; 5) is there a crime scene involved that needs to be cleared for traffic rather than sitting and typing a warrant. Court specifically rejected the argument that warrant should presumptively be sought and instead stated that the Mitchell standard is workable and applicable in Iowa.

VI. Cannabis – Hemp or Marijuana

State v. Heuser, 661 N.W.2d 157, 165 (Iowa 2003)

"The labels found on the boxes and batteries were properly admitted into evidence under the 'market reports, commercial publications' exception [(Iowa Rule of Evidence 5.803(17))] as substantive proof that the boxes contained pseudoephedrine and the batteries contained lithium." "In [State v. Beiser, 248 Iowa 728, 732, 82 N.W.2d 115, 117 (1957)], the court found the labels on beer bottles supported the conclusion that beer had the alcoholic content specified by statute because the statute required the labels to state the alcohol concentration." "The bottles were labeled "beer" and sold as containing beer; consumers have a right to rely on the truth of the label."

https://www.iowaattorneygeneral.gov/media/cms/Hemp_Statement_final_EF65D75D867DF.pdf

https://dps.iowa.gov/sites/default/files/criminal-investigation/criminalistics-laboratory/laboratory/stakeholder-information/Memo%20Cannabis%2008312020.pdf

Juveniles: Iowa Code §232.11 requires a child taken into custody for OWI or any serious misdemeanor or above to be advised of his/her right to counsel. This does not mean that you have to provide the child with counsel while conducting SFSTs in the field. Once taken into custody, advise the child of their Miranda rights. For a child under the age of sixteen, obtain written consent of a parent, guardian, or custodian before conducting a DRE evaluation or interrogation. For a child sixteen or over, make a good faith effort to notify the parent, guardian or custodian that the child has been taken into custody, the crime for which the child has been accused, and the location of the child. You must also advise the parent, guardian, or custodian of the right to confer with the child or visit the child in person. If the child is sixteen or older, the child may waive Miranda rights if a good faith effort has been made to contact a parent, guardian or custodian but the effort was unsuccessful.

All other provisions of an OWI investigation remain the same for a child as for an adult.

804.20 Communications by Arrested Persons

Any peace officer or other person having custody of any person arrested or restrained of the person's liberty for any reason whatever, shall permit that person, without unnecessary delay after arrival at the place of detention, to call, consult, and see a member of the person's family or an attorney of the person's choice, or both. Such person shall be permitted to make a reasonable number of telephone calls as may be required to secure an attorney. If a call is made, it shall be made in the presence of the person having custody of the one arrested or restrained. If such person is intoxicated, or a person under eighteen years of age, the call may be made by the person having custody. An attorney shall be permitted to see and consult confidentially with such person alone and in private at the jail or other place of custody without unreasonable delay. A violation of this section shall constitute a simple misdemeanor.

You have the right to call anyone for any reason, including a family member and attorney.

You have the right to see and consult a member of your family or an attorney or both, should they come to the place of detention.

If you wish to speak confidentially with an attorney, you have the right to a face-to-face, unobstructed, confidential, and private meeting with an attorney should they come to the place of detention, free from video and audio recording.

You have until _____ to exercise these rights.

321J.11 Taking Sample for Test

The person may have an independent chemical test or tests administered at the person's own expense in addition to any administered at the direction of a peace officer. The failure or inability of the person to obtain an independent chemical test or tests does not preclude the admission of evidence of the results of the test or tests administered at the direction of the peace officer. Upon the request of the person who is tested, the results of the test or tests administered at the direction of the peace officer shall be made available to the person.

Any test result or refusal of the offered chemical test will be used against you or admissible in administrative and criminal proceedings. You have a right to refuse the offered chemical test.

You have the right to an independent chemical test, only after consenting to the officer’s requested chemical test and submitting a satisfactory sample for testing. This test will be at your expense.

Signature _____ Date _____ Time _____

Signature _____ Date _____ Time _____